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BNSF Railway Company

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

BNSF RAILWAY COMPANY, a Delaware corporation,	**Cause No.CV-07-137-BLG-RFC-CSO**
Plaintiff,	
vs.	
MATT O'DEA,	**COMPLAINT**
Defendant.	

COMES NOW BNSF Railway Company and files this complaint seeking judicial review of a final administrative decision of the Montana Human Rights Commission.

1. Statement of Facts for Jurisdiction and Venue

BNSF Railway Company (BNSF), is a Delaware corporation with its registered agent in Yellowstone County, Montana. The Court has jurisdiction because this is a dispute between citizens of different states and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. Venue is proper in the Billings Division because venue would be proper in Yellowstone County in state court pursuant to M.C.A. 2-4-704 in that BNSF resides in and has its principal place of business for Montana in Yellowstone County, which is within the Billings Division of the District of Montana. Mont. Dist. L. R. 1.9, 1.11.

2. Standing

BNSF is aggrieved because it has been unlawfully found to have discriminated against Matt O'Dea and has been unlawfully subjected to the Human Rights Commission's Order affirming the earlier order of the Human Rights Bureau in case No. 0051011210.

3. Claim for Judicial Review

Pursuant to Section 2-4-702 M.C.A., BNSF is entitled to seek judicial review of the Human Rights Commission's Order affirming the earlier order of the Human Rights Bureau in case No. 0051011210, dated September 27, 2007.

4. Grounds for Review

The grounds for review are as follows:

a. Charging party Matt O'Dea filed a complaint of discrimination with the Montana Department of Labor and Industry, Employment Relations Division, alleging that BNSF had discriminated against him by refusing to hire him because of a perceived disability (obesity) in violation of the Montana Human Rights Act, Title 49, Chapter 2 MCA, the Americans with Disabilities Act of 1990, and Title VII of the Civil Rights Act of 1964.

b. BNSF had extended a conditional offer of employment to Charging Party for the position of Conductor

Trainee on the railroad. The Conductor position ultimately requires the employee to be suitable for the job of Locomotive Engineer. Based on an individualized medical assessment, including the review of medical information submitted by O'Dea, BNSF disqualified O'Dea from consideration for the position of Conductor Trainee.

c. A hearing examiner granted O'Dea's motion for a summary ruling on the issue of liability on August 11, 2006. On May 15, 2007, the hearing examiner issued a final decision awarding damages and other relief to O'Dea.

d. The Human Rights Commission affirmed the hearing examiner's decisions on September 27, 2007.

e. The orders of the Bureau and the Commission are in violation of the Montana Human Rights Act, Title 49, Chapter 2 MCA, and the Americans with Disabilities Act of 1990, have prejudiced the substantial rights of BNSF in that the agency's findings, inferences, conclusions, and decisions are (i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency; (iii) affected by error of law; (iv) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and (v) arbitrary and capricious, characterized by abuse of discretion and clearly unwarranted exercise of discretion. M.C.A. 2-4-704.

f. O'Dea failed to meet his burden of demonstrating that BNSF perceived him as disabled because he could not demonstrate that BNSF regarded him as incapable of performing a broad range of jobs. As such, the agency had no jurisdiction over this matter. The order is unsupported by the evidence and is contrary to law.

g. O'Dea also presented no probative evidence supporting the award of damages.

h. The prospective relief ordered by the agency is unlawful and exceeds the authority of the agency and should, in any event, be reversed because of the lack of evidence supporting the liability finding.

5. **Relief Requested**

Wherefore, BNSF Railway Company respectfully requests a complete dismissal of the Charging Party's complaint or in the alternative modification or dismissal of those portions of the order that are clearly erroneous, unsupported by evidence or in excess of the authority of the agency. BNSF further requests any additional relief the court deems just.

DATED this 3rd day of October, 2007.

PHILLIPS BOHYER & HEDGER, P.C.

By: /s/ Jeff Hedger
Jeff Hedger

Attorneys for BNSF Railway Company

CERTIFICATE OF SERVICE

I, the undersigned, a representative of the law firm of Phillips Bohyer & Hedger, P.C., hereby certify that I served a true and complete copy of the foregoing "***Complaint***" on the following persons by the following means:

1	CM/ECF
	Hand Delivery
2,3	Mail
	Overnight Delivery Service
	Fax
	E-Mail

1. Clerk, U.S. District Court

2. Terry Trieweiler
TRIEWEILER LAW FIRM
P.O. Box 5509
Whitefish, Montana 59937
Attorney for Defendant

3. State of Montana
Dept. of Labor & Industry
Employee Relations Div.
Human Rights Bureau
P.O. Box 1728
Helena, Montana 59624-1728

DATE: October 3, 2007   /s/ Jeff Hedger